Supreme Court, U.S.
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No. 04-1144

In The Supreme Court of the United States

KELLY A. AYOTTE, ATTORNEY GENERAL
OF THE STATE OF NEW HAMPSHIRE,
IN HER OFFICIAL CAPACITY,

Petitioner,

v.

PLANNED PARENTHOOD OF NORTHERN
NEW ENGLAND, CONCORD FEMINIST
HEALTH CENTER, FEMINIST HEALTH CENTER
OF PORTSMOUTH, AND WAYNE GOLDNER, M.D.,

Respondents.

**On Writ Of Certiorari To The
United States Court Of Appeals
For The First Circuit**

JOINT APPENDIX

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NOTICE

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United States District Court
District of New Hampshire
Case No. C-03-491-JD

November 17, 2003	Complaint
November 17, 2003	Motion by plaintiffs Concord Feminist Health Center, Feminist Health Center of Portsmouth, Wayne Goldner, Planned Parenthood of Northern New England for Preliminary Injunction with memorandum, declarations and attachments
November 19, 2003	Notice by Concord Feminist Health Center, Feminist Health Center of Portsmouth, Wayne Goldner, Planned Parenthood of Northern New England of Response to Court's Inquiry Concerning Consolidation of Proceedings on Preliminary and Permanent Injunction
December 3, 2003	Objection to Motion for Preliminary Injunction filed by Attorney General of New Hampshire
December 9, 2003	Order by Judge Joseph A. DiClerico, Jr. stating that Plaintiff's request for declaratory and permanent injunctive relief will be consolidated with their request for preliminary relief
December 10, 2003	Reply to Objection to Motion for Preliminary Injunction filed by Feminist Health Center of Portsmouth, Wayne Goldner, and Planned Parenthood of Northern New England

December 29, 2003	Order by Judge Joseph A. DiClerico, Jr. granting plaintiff's Motion for Preliminary Injunction (subsumed into plaintiff's request for permanent injunction)
December 29, 2003	Judgment for Plaintiffs entered by Clerk James R. Starr
January 26, 2004	Defendant's Notice of Appeal to the United States Court of Appeals for the First Circuit

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United States Court of Appeals for the First Circuit Docket No. 04-1161

January 30, 2004	Civil Case Docketed
April 8, 2004	Brief filed by appellant Peter Heed
May 11, 2004	Brief filed by appellees Planned Parenthood of Northern New England, Concord Feminist Health Center, Feminist Health Center of Portsmouth, and Wayne Goldner, M.D.
November 24, 2004	Opinion filed affirming decision of the District Court
November 24, 2004	Judgment entered
December 16, 2004	Mandate issued

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW HAMPSHIRE

PLANNED PARENTHOOD OF NORTHERN NEW ENGLAND, CONCORD FEMINIST HEALTH CENTER, FEMINIST HEALTH CENTER OF PORTSMOUTH, and WAYNE GOLDNER, M.D.,	)	CIVIL ACTION NO:
Plaintiffs,	)	
v.	)	
PETER HEED, Attorney General of New Hampshire, in his official capacity,	)	
Defendant.	)	

COMPLAINT

PRELIMINARY STATEMENT

1. This action seeks injunctive and declaratory relief, pursuant to 42 U.S.C. § 1983, against enforcement of the new New Hampshire law that prevents a minor from obtaining an abortion unless a parent has been notified at least forty-eight hours in advance of the abortion. 2003 N.H. Laws ch.173, to be codified at RSA 132:24-:28 (the Act). A copy of the Act is attached to the Complaint as Exhibit A. The Act is scheduled to take effect December 31, 2003.

2. Contrary to thirty years of Supreme Court precedent, the Act contains no exception to its notice and delay requirements for circumstances in which delay will threaten the health of the young woman. Without such an exception, doctors will be forced to delay abortions for

critically ill minors, putting them at risk for serious medical problems including infertility, loss of vision, and impaired liver and kidney function. For this reason alone, the Act is unconstitutional.

3. In violation of constitutional commands, the Act also endangers young women by preventing physicians from performing even emergency life-saving abortions unless the physician can certify that the minor will die within the time it takes to comply with the Act's notice requirements, and the abortion is the only procedure that will prevent death. Because physicians are not always able in life-threatening situations to make such a certification, the Act threatens the well-being of minors even in these circumstances. Moreover, the Act violates the due process rights of abortion providers and chills the provision of emergency abortions by failing to make clear that physicians may rely on their good faith medical judgment in determining which abortions are necessary to prevent imminent death.

4. The Act also endangers and violates the rights of those minors who cannot safely notify a parent of their pregnancy and need for an abortion. The Constitution guarantees these young women the right to seek a confidential judicial waiver of the Act's notice requirements. But the Act fails to include specific provisions that are necessary to ensure the confidentiality of young women who need such a waiver. For example, the Act has no provision requiring that the court records be sealed or the hearing be closed. Without such provisions to protect their confidentiality, minors will face the very harms of parental notification that they sought to avoid by seeking a waiver.

JURISDICTION AND VENUE

5. This Court has jurisdiction over this action pursuant to 28 U.S.C. §§ 1331 and 1343.

6. Declaratory relief is authorized by 28 U.S.C. §§ 2201 and 2202.

7. Venue is proper in this District pursuant to 28 U.S.C. § 1391(b) because defendant and plaintiffs are located in the District of New Hampshire.

PARTIES

Plaintiffs

8. Planned Parenthood of Northern New England (PPNNE) is a Vermont not-for-profit charitable organization registered to do business in New Hampshire with headquarters in Williston, Vermont. PPNNE operates health centers in New Hampshire, Maine and Vermont, with eight centers in New Hampshire. PPNNE offers its patients a full range of reproductive health services, including family planning counseling and medical services; testing and treatment of sexually transmitted infections; HIV/AIDS testing and counseling; breast and cervical cancer screening; pregnancy testing and options counseling; education and community outreach; abortions; and prenatal care. In New Hampshire, PPNNE offers abortions at its West Lebanon center. Among PPNNE's patients are unemancipated women under the age of eighteen who need abortions. PPNNE sues on its own behalf and on behalf of its minor patients.

9. Concord Feminist Health Center (CFHC) is a New Hampshire-based not-for-profit charitable organization that operates a reproductive health care center in Concord.

CFHC provides a full range of reproductive health care services, including family planning counseling and medical services; testing and treatment of sexually transmitted infections; HIV/AIDS testing and counseling; prevention and screening for breast and gynecological cancer; health education and community outreach; pregnancy testing and options counseling; and abortions. Among CFHC patients are unemancipated women under the age of eighteen who need abortions. CFHC sues on its own behalf and on behalf of its minor patients.

10. Feminist Health Center of Portsmouth (FHCP) is a New Hampshire-based not-for-profit charitable organization that operates a reproductive health care center in Greenland. FHCP offers full well-woman gynecological care, including family planning counseling and medical services; testing and treatment for sexually transmitted infections; counseling and anonymous testing for HIV/AIDS for women and men; prevention and screening for breast and gynecological cancers; health education and community outreach; pregnancy testing and options counseling; and abortions. F-HCP's patients include unemancipated women under the age of eighteen who need abortions. FHCP sues on its own behalf and on behalf of its minor patients.

11. Dr. Wayne Goldner is an obstetrician and gynecologist in private practice in Manchester. Dr. Goldner provides a full range of services, including pregnancy testing and options counseling; prenatal care; delivery of newborns; prevention and screening of gynecological and breast cancers; evaluation and treatment for infertility; care for symptoms of menopause; screening and treatment for sexually transmitted infections; counseling and testing for HIV/AIDS; and abortions. Among his patients are

unemancipated women under the age of eighteen who need abortions. Dr. Goldner sues on his own behalf and on behalf of his minor patients.

Defendant

12. Peter Heed is the Attorney General of New Hampshire. He is charged by law with supervision of all county attorneys and other prosecutors and enforcement of the criminal laws of New Hampshire, including the Act. Attorney General Heed is sued in his official capacity, as are his agents and successors in office.

STATUTORY FRAMEWORK

13. The Act defines "abortion" as the "use or prescription of any instrument, medicine, drug, or any other substance or device intentionally to terminate the pregnancy of a female known to be pregnant with an intention other than to increase the probability of a live birth, to preserve the life or health of the child after live birth, or to remove an ectopic pregnancy or the products from a spontaneous miscarriage." RSA 132:24, I.[1]

14. The Act prohibits performance of an abortion upon an unemancipated minor unless the physician or his or her agent provides at least forty-eight hours advance notice of the abortion to one of the minor's parents. *Id.* 132:25, I. The forty-eight hour notice period begins to run from the time of delivery of the notice. Notice may be

[1] For clarity, citations are to sections of the Revised Statutes Annotated where the Act will be codified, rather than to the session law.

delivered in person to the parent's residence or by certified mail. If sent by certified mail, the notice is deemed delivered at noon on the next day on which regular mail delivery takes place subsequent to mailing. *Id.* 132:25, II & III. These requirements may be dispensed with if the parent certifies in writing that he or she has been notified. *Id.* 132:26, I(b).

15. In lieu of parental notification, a minor may petition a court of competent jurisdiction for a waiver of the notice requirement. The court must grant the waiver if it finds that the minor is mature and capable of giving informed consent to the abortion or the performance of an abortion without parental notification is in the minor's best interests. *Id.* 132:26, II.

16. The Act states that the judicial waiver process "shall be confidential," but no specific procedures are set forth in the statute to effectuate this right of confidentiality. For example, no provision is made for sealing of the record or closing of hearings or appellate arguments. *Id.* 132:26, II(b).

17. The Act states that the court must rule on the minor's petition within seven calendar days from the time the petition is filed. *Id.* 132:26, II(b). A minor has a right to appeal an adverse decision and the appellate court must rule on her petition within seven calendar days of the docketing of the appeal. *Id.* 132:26, II(c).

18. The sole exception to notification or judicial waiver is when the attending physician "certifies" in the pregnant minor's medical record that the abortion "is necessary to prevent the minor's death and there is insufficient time to provide the required notice." *Id.*

132:26, I(a). There is no exception for medical emergencies that will not result in imminent death.

19. Violation of the Act is a misdemeanor and grounds for a civil action by a person wrongfully denied notification. A provider may avoid criminal or civil liability by "establish[ing] by written evidence" that he or she "relied on evidence sufficient to convince a careful and prudent person that the representations of the pregnant minor regarding information necessary to comply with the section are bona fide and true." *Id.* 132:27.

FACTUAL ALLEGATIONS

20. Abortion is among the safest surgical procedures that doctors perform. Both in terms of mortality (death) and morbidity (serious complications), abortion is safer than carrying a pregnancy to term. Although abortion remains safe throughout pregnancy, the risks associated with the procedure increase as the pregnancy progresses.

21. Most minors involve a parent in their decision to have an abortion. The younger the minor is, the more likely she is to do so. Most minors who do not involve a parent involve a trusted adult such as a relative or school nurse.

22. Confidentiality is of the greatest concern to all women seeking abortion services, but particularly to minors. Among the urgent reasons a minor may fear revealing her pregnancy and planned abortion to a parent are fear of parental retaliation, including physical abuse, being made to leave home, and being forced to carry a pregnancy to term against her will.

23. The judicial bypass provided by the Act fails to provide the confidentiality minors need because it fails to

set forth specific procedures to safeguard the minor's identity. For example, it fails to explicitly require the sealing of records or the conducting of hearings in a closed chamber. Without these protections, minors will be deterred from seeking judicial waivers they need. Moreover, the Act's failure to protect minors' confidentiality could lead to parental notification and the very harms minors seek to avoid by using the judicial bypass.

24. The Act fails to allow a physician to provide a prompt abortion to a minor whose health would be endangered by the delay necessary to comply with the Act.

25. There are a number of urgent medical situations that require a prompt abortion to be provided to protect the health of the woman. Among these situations are premature rupture of the membranes that enclose the pregnancy; preeclampsia; and significant bleeding from the uterus in early pregnancy. Often, in these situations, delaying the procedure in order to comply with the parental notification requirements of the statute or for the minor to obtain a court waiver, would pose dangers to the minor's health, including the danger of infertility, vision loss, chronic pain, or kidney or liver damage. Yet, the physician will not always be able to certify that performing the procedure without the delay required by the Act would be necessary to prevent the minor's death.

26. By failing to allow immediate abortions in circumstances where the minor's health, but not her life, is threatened by the delay necessary to comply with the Act, the Act endangers the health of minors.

27. The Act's requirement that even to protect a minor's life the physician "certif[y]" that "the abortion is necessary to prevent the minor's death and there is

insufficient time to provide the required notice," endangers even those minors in need of life-saving abortions. Because a physician cannot accurately predict when a minor's condition has progressed to the point where she will die within the time it takes to comply with the Act's requirements, physicians will not be able to rely on this exception.

28. The requirement that the abortion be the only procedure that will prevent death during the period necessary to comply with the Act will require physicians to use procedures to stave off death that could cause long term impairment of the minor's health.

29. The Act's exception for abortions necessary to prevent a minor's imminent death does not make it clear that a physician may exercise his or her best medical judgment in making the certification required by the Act. The prospect of prosecutors, judges and juries disagreeing with physicians' judgment and convicting them for acting on their good faith medical judgment will chill the provision of emergency abortion services.

30. The Act states that a provider may avoid criminal or civil liability by "establish[ing] by written evidence" that he or she "relied on evidence sufficient to convince a careful and prudent person that the representations of the pregnant minor regarding information necessary to comply with the section are bona fide and true." RSA 132:27. This provision places an unduly high burden of proof on providers seeking to defend themselves against civil or criminal liability. RSA 132:27 further conflicts with standards of culpability set out in RSA 626:2. This conflict renders the Act void for vagueness.

CLAIMS FOR RELIEF

FIRST CAUSE OF ACTION

31. The Act deprives plaintiffs' patients of their right to privacy as protected by the Fourteenth Amendment to the United States Constitution by (a) failing to allow prompt abortions necessary to protect the woman's health; (b) failing to provide an adequate emergency exception to protect their lives; (c) failing to provide a confidential judicial waiver procedure; (d) chilling the provision of abortions services by failing to give clear notice of what conduct is prohibited by the Act's terms and placing an unduly high burden of proof on providers seeking to defend themselves against civil and criminal liability.

SECOND CAUSE OF ACTION

32. The Act deprives plaintiffs of due process of law as protected by the Fourteenth Amendment to the United States Constitution by (a) subjecting plaintiffs to criminal prosecution and civil liability for providing abortions to prevent the minor's death without clearly providing that they may rely on their good faith medical judgment in certifying that such abortions are necessary to prevent the minor's imminent death; (b) containing vague and/or conflicting terms that fail to give plaintiffs adequate notice of what conduct the law prohibits; and (c) placing an unduly high burden of proof on providers seeking to defend themselves against civil and criminal liability.

WHEREFORE, Plaintiffs request that the Court:

1. Issue a declaratory judgment that the Act violates the rights of plaintiffs and their patients as protected by

the Fourteenth Amendment to the United States Constitution and is therefore void and of no effect;

2. Issue preliminary and permanent relief, without bond, restraining enforcement, operation and execution of the Act by enjoining defendant, his agents employees, appointees or successors from enforcing, threatening to enforce or otherwise applying the provisions of the Act;

3. Grant plaintiffs attorneys' fees, costs and expenses pursuant to 42 U.S.C. § 1988; and

4. Grant such further relief as this Court deems just and proper.

Respectfully submitted,

Dated: November 17, 2003 /s/ Martin P. Honigberg

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Wayne Goldner, M.D.

EXHIBIT A

CHAPTER 173
HB 763-FN – FINAL VERSION

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STATE OF NEW HAMPSHIRE

In the Year of Our Lord Two Thousand Three

AN ACT requiring parental notification before abortions may be performed on unemancipated minors.

Be it Enacted by the Senate and House of Representatives in General Court convened:

173:1 Legislative Purpose and Findings.

I. It is the intent of the legislature in enacting this parental notification provision to further the important and compelling state interests of protecting minors against their own immaturity, fostering the family structure and preserving it as a viable social unit, and protecting the rights of parents to rear children who are members of their household.

II. The legislature finds as fact that:

(a) Immature minors often lack the ability to make fully informed choices that take account of both immediate and long-range consequences.

(b) The medical, emotional, and psychological consequences of abortion are serious and can be lasting, particularly when the patient is immature.

(c) The capacity to become pregnant and the capacity for mature judgment concerning the wisdom of abortion are not necessarily related.

(d) Parents ordinarily possess information essential to a physician's exercise of best medical judgment concerning the child.

(e) Parents who are aware that their minor daughter has had an abortion may better ensure that she receives adequate medical attention after the abortion.

III. The legislature further finds that parental consultation is usually desirable and in the best interest of the minor.

173:2 New Subdivision; Parental Notification Prior to Abortion. Amend RSA 132 by inserting after section 23 the following new subdivision:

Parental Notification Prior to Abortion

132:24 Definitions. In this subdivision:

I. "Abortion" means the use or prescription of any instrument, medicine, drug, or any other substance or device intentionally to terminate the pregnancy of a female known to be pregnant with an intention other than to increase the probability of a live birth, to preserve the life or health of the child after live birth, or to remove an ectopic pregnancy or the products from a spontaneous miscarriage.

II. "Commissioner" means the commissioner of the department of health and human services.

III. "Department" means the department of health and human services.

IV. "Emancipated minor" means any minor female who is or has been married or has by court order otherwise been freed from the care, custody, and control of her parents.

V. "Guardian" means the guardian or conservator appointed under RSA 464-A, for pregnant females.

VI. "Minor" means any person under the age of 18 years.

VII. "Parent" means one parent of the pregnant girl if one is living or the guardian or conservator if the pregnant girl has one.

132:25 Notification Required.

I. No abortion shall be performed upon an unemancipated minor or upon a female for whom a guardian or conservator has been appointed pursuant to RSA 464-A because of a finding of incompetency, until at least 48 hours after written notice of the pending abortion has been delivered in the manner specified in paragraphs II and III.

II. The written notice shall be addressed to the parent at the usual place of abode of the parent and delivered personally to the parent by the physician or an agent.

III. In lieu of the delivery required by paragraph II, notice shall be made by certified mail addressed to the

parent at the usual place of abode of the parent with return receipt requested and with restricted delivery to the addressee, which means the postal employee shall only deliver the mail to the authorized addressee. Time of delivery shall be deemed to occur at 12 o'clock noon on the next day on which regular mail delivery takes place, subsequent to mailing.

132:26 Waiver of Notice.

I. No notice shall be required under RSA 132:25 if:

(a) The attending abortion provider certifies in the pregnant minor's medical record that the abortion is necessary to prevent the minor's death and there is insufficient time to provide the required notice; or

(b) The person or persons who are entitled to notice certify in writing that they have been notified.

II. If such a pregnant minor elects not to allow the notification of her parent or guardian or conservator, any judge of a court of competent jurisdiction shall, upon petition, or motion, and after an appropriate hearing, authorize an abortion provider to perform the abortion if said judge determines that the pregnant minor is mature and capable of giving informed consent to the proposed abortion. If said judge determines that the pregnant minor is not mature, or if the pregnant minor does not claim to be mature, the judge shall determine whether the performance of an abortion upon her without notification of her parent, guardian, or conservator would be in her best interests and shall authorize an abortion provider to perform the abortion without such notification if said

judge concludes that the pregnant minor's best interests would be served thereby.

(a) Such a pregnant minor may participate in proceedings in the court on her own behalf, and the court may appoint a guardian ad litem for her. The court shall, however, advise her that she has a right to court-appointed counsel, and shall, upon her request, provide her with such counsel.

(b) Proceedings in the court under this section shall be confidential and shall be given such precedence over other pending matters so that the court may reach a decision promptly and without delay so as to serve the best interest of the pregnant minor. In no case shall the court fail to rule within 7 calendar days from the time the petition is filed. A judge of the court who conducts proceedings under this section shall make in writing specific factual findings and legal conclusions supporting the decision and shall order a record of the evidence to be maintained including the judge's own findings and conclusions.

(c) An expedited confidential appeal shall be available to any such pregnant minor for whom the court denies an order authorizing an abortion without notification. The court shall make a ruling within 7 calendar days from the time of the docketing of the appeal. An order authorizing an abortion without notification shall not be subject to appeal. No filing fees shall be required of any such pregnant minor at either the trial or the appellate level. Access to the trial court for the purposes of such a petition or motion, and access to the appellate courts for purposes of making an appeal from denial of the same,

shall be afforded such a pregnant minor 24 hours a day, 7 days a week.

132:27 Penalty. Performance of an abortion in violation of this subdivision shall be a misdemeanor and shall be grounds for a civil action by a person wrongfully denied notification. A person shall not be held liable under this section if the person establishes by written evidence that the person relied upon evidence sufficient to convince a careful and prudent person that the representations of the pregnant minor regarding information necessary to comply with this section are bone [sic] fide and true, or if the person has attempted with reasonable diligence to deliver notice, but has been unable to do so.

132:28 Severability. If any provision of this subdivision or the application thereof to any person or circumstance is held invalid, such invalidity shall not affect the provisions or applications of this subdivision which can be given effect without the invalid provisions or applications. and to this end, the provisions of this subdivision are severable.

173:3 Effective Date. This act shall take effect December 31, 2003.

(Approved: June 19, 2003)
(Effective Date: December 31, 2003)

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW HAMPSHIRE

PLANNED PARENTHOOD OF NORTHERN NEW ENGLAND, CONCORD FEMINIST HEALTH CENTER, FEMINIST HEALTH CENTER OF PORTSMOUTH, and **WAYNE GOLDNER, M.D.,** Plaintiffs, v. **PETER HEED,** Attorney General of New Hampshire, in his official capacity, Defendant.	CIVIL ACTION NO:

DECLARATION OF WAYNE GOLDNER, M.D.

Wayne Goldner, M.D., declares and states the following:

1. I am an obstetrician and gynecologist in private practice in Manchester. I am board certified by the American Board of Obstetricians and Gynecologists, licensed to practice medicine by the State of New Hampshire, and a fellow in the American College of Obstetricians and Gynecologists. I graduated from the University of Pennsylvania School of Medicine in 1978 and completed a residency in obstetrics and gynecology at Baystate Medical Center in 1982. From 1989-1991, I was the chair of the Department of Obstetrics and Gynecology at Elliot Hospital, where I continue to provide hospital-based care. I am one of the plaintiffs in this action.

2. I have practiced obstetrics and gynecology since 1982. I provide my patients with a full range of services, including pregnancy testing and options counseling; prenatal care; delivery of newborns; prevention and screening of gynecological and breast cancers; evaluation and treatment for infertility; care for symptoms of menopause; screening and treatment for sexually transmitted infections; counseling and testing for HIV/AIDS; and abortions.

3. Abortion is an extremely safe medical procedure. Indeed, it is among the safest surgical procedures that doctors perform. Both in terms of mortality (death) and morbidity (serious complications short of death) abortion is many times safer than continuing pregnancy through to childbirth. Although abortion remains safe throughout pregnancy, the risks associated with the procedure increase as the pregnancy progresses.

4. My patients include both adult women and teenagers. The majority of my teenage patients who seek abortions (approximately 60 to 70 percent) bring a parent with them to the appointment. Most teens who do not bring a parent bring another significant adult, such as a grandmother.

5. I have read the New Hampshire Parental Notification Prior to Abortion Act (the Act). As I understand it, the Act requires that, unless a minor's parent certifies in writing that he or she has been notified of the minor's abortion, I will have to notify the minor's parent, then wait at least forty-eight hours before performing the abortion. If the teenager cannot notify her parent, she may opt instead to go to court seeking authorization for the abortion. While the young woman figures out the court

process, applies for the judicial waiver, and awaits a decision from the court, the abortion may be delayed for a week, two weeks, and possibly longer. If I do not comply with the Act, I risk criminal prosecution and civil lawsuits.

6. As I understand it, the Act contains no exception for circumstances where my patient needs a prompt abortion to protect her health and only a limited exception for circumstances where the abortion is needed to protect her life. I submit this declaration in support of plaintiffs' motion for a preliminary injunction because it is my professional opinion that the Act's failure to include a health exception and a sufficient life exception will put young women at grave risk.

The Lack of a Health Exception Puts My Patients at Risk

7. For teens facing medical emergencies, the Act permits me to perform an immediate abortion only when I can certify that the abortion is "necessary to prevent the minor's death and there is insufficient time to provide the required notice." RSA 132:26,I(a). It does not allow me to proceed immediately if the delay required by the Act threatens my patient's health, but an immediate abortion is not necessary to prevent her death. Thus, unless I can get a written certification from a parent, the Act will force me to subject a teen patient to a delay of at least forty-eight hours *even if* the teen needs an immediate abortion to prevent serious harm to her health. Unfortunately, there are many such conditions. I detail some of them below.

8. For example, a pregnant teenager can develop preeclampsia, a form of pregnancy-induced hypertension

characterized by excessively high blood pressure. Preeclampsia puts a woman at risk for liver and kidney dysfunction or failure; severe bleeding; vision loss; and fluid in the lungs. If not treated, preeclampsia may also progress to eclampsia, which can cause seizures, coma, and even death. Both preeclampsia and eclampsia occur most frequently in young women pregnant for the first time. The only cure for preeclampsia is termination of the pregnancy.

9. A patient who presents with preeclampsia probably will not die within forty-eight hours, and therefore I generally won't be able to certify that an "abortion is necessary to prevent her death and there is insufficient time to provide the required notice." Yet, because delay may well cause substantial harm to the patient's liver, kidneys, or vision, the best medical course will often be to end the pregnancy immediately. But because the Act contains no exception for circumstances where delay will cause serious harm to a patient's health, the Act would force doctors to jeopardize their patients' health by delaying the abortion.

10. A pregnant teen may also experience premature rupture of the membranes, a condition where the membranes that surround a fetus and that contain amniotic fluid rupture prior to fetal viability. Women with premature rupture of membranes are at risk of developing a serious infection of the placental lining, called chorioamnionitis. When a woman with premature rupture of membranes develops this type of infection, she is at serious risk of severe and permanent harm to her health, including scarring of the reproductive organs which can cause total infertility, chronic pelvic pain, and an abdominal abscess. If not treated appropriately, chorioamnionitis

can lead to systemic sepsis (an infection that spreads throughout the body) and even cause death.

11. The course of chorioamnionitis is unpredictable and it can spread quickly. Because every minute the woman remains infected, she is at risk of serious damage to her health, the best medical course is often to provide an immediate abortion. But because a woman in the early stages of the infection probably won't die within forty-eight hours, the Act will force me to delay the procedure. While I wait, my patient is at risk of serious and permanent harm to her health: without a prompt abortion she may lose the ability ever to become pregnant again and may be subject to serious pain for the rest of her life.

12. Other women develop what is known as spontaneous chorioamnionitis, not associated with premature rupture of membranes. This condition may start with a simple urinary tract infection or a sexually transmitted infection, such as chlamydia, which is extremely prevalent among sexually active teenagers. For pregnant women with spontaneous chorioamnionitis, the infection may travel from the pelvic organs throughout the body. To prevent patients from suffering serious, chronic pain, losing their future fertility, or damaging major organ systems, such as their kidneys or liver, the best medical course is to perform a prompt abortion. But the Act prevents me from providing medically appropriate care. Unless I am able to certify that an "abortion is necessary to prevent her death and there is insufficient time to provide the required notice," something I am unlikely to be able to do, I will have to delay the abortion for forty-eight hours or more and expose my patient to the real risk of a lifetime of pain, infertility, and permanent, significant health problems.

13. Pregnant patients may also develop a host of other pelvic infections that may require an immediate abortion. These infections can be triggered by a number of causes, such as an IUD that has remained in place in the uterus, or a sexually transmitted infection. As with chorioamnionitis, delaying an abortion for a pregnant patient with a pelvic infection puts the patient at risk of permanent damage to her health, including infertility and chronic pain. But because in most circumstances I am unlikely to be able to certify that a patient with such an infection will die within forty-eight hours without an abortion, the Act requires that I delay treatment, and put my patient's long-term health at risk.

14. An immediate abortion may also be needed when a woman experiences heavy bleeding from the uterus. This condition may well arise at an early stage of pregnancy. Severe bleeding places the teenager at risk of dangerously low blood pressure, permanent kidney and liver damage, and infertility. Such patients are also often at risk for infection, with all the dangers that entails. If the patient loses a lot of blood, she will require blood transfusions, which carry their own risks.

15. When a patient experiences this significant bleeding the best medical course may be to provide an immediate abortion. Unless the bleeding is quite severe though, she probably will not die within the time it takes to comply with the Act's notice requirements, and therefore I will have to delay providing the abortion for forty-eight hours or more. But if I delay, my patient will be at risk of kidney and liver damage, as well as the complications from infection and blood transfusions that I detailed above.

The Act's Narrow Death Exception Endangers My Patients' Health and Lives

16. I am also concerned that the Act will prevent me from providing appropriate care even when my patient's life is at risk. As I understand it, for minors facing even life-threatening emergencies, the only exception to the parental notice requirements comes when I can "*certif[y]*" that "the abortion is *necessary* to prevent the minor's death and there is *insufficient time to provide the required notice.*" RSA 132:26,I(a) (emphasis added). In many ways, however, this death exception does not reflect medical reality and is insufficient to protect my patients.

17. For women facing certain life-threatening conditions, the best medical course is often to provide an immediate abortion. Yet, as I understand it, the Act allows me to proceed immediately only when I can certify that my patient will die within the time it takes to comply with the Act's notice requirement. But that just is not the way medicine works: Whether and when a patient will die cannot be predicted with such accuracy. Patients do not become progressively sick according to a pattern such that I could say at a certain point in time that they [sic] patient has forty-eight hours to live. The course of these medical conditions is unpredictable: A patient might appear to be close to death but live for days. On the other hand, unfortunately, a sick patient might seem sufficiently stable to live for forty-eight hours or more, but suddenly die. Because I cannot tell in advance how quickly my patients' condition will worsen, I will not be able to certify – as the Act requires – that she would die before I fulfilled the Act's notice requirements. Therefore, the Act will force me to choose between following the law and letting my patient's condition deteriorate, possibly past the point of being able

to save her life at all, and alternatively providing appropriate medical care to my patient and risking criminal prosecution and being sued by her parents. The law should not put patients and their doctors in this untenable position.

18. The Act also ties doctors' hands and threatens patients by preventing physicians from performing life-saving abortions unless they can certify that the abortion is "necessary" to prevent the minor's death. But again, this ignores medical realities and puts my patients at risk. Although an abortion may be the safest and most medically appropriate way to save my patient's life, because there often will be other treatments, such as antibiotics and blood transfusions, that will keep my patient alive for some period of time, I will not be able to certify that the abortion is "necessary" to prevent her death. Under the Act, then, I would be required to provide this other treatment even where it poses far greater risks than an abortion and could result in irreversible adverse health consequences for my patient, such as damage to her kidneys or liver or infertility. The combination of the Act's cramped death exception and the absence of any exception to protect my patients' health forces physicians to act contrary to their patients' best medical interests and thereby jeopardize our patients' health.

19. All of this is made worse, because, as I understand it, the Act also does not entrust to the physician's good faith medical judgment the decision of whether an immediate abortion is necessary to prevent the minor's death within a given time. This makes me very nervous. It goes without saying that abortion is extremely controversial. On top of that, as I have said, medicine is not an exact science. Unless I am allowed to rely on my good faith

medical judgment, I could be convicted if the prosecution convinced a jury that my patient had an extra day to live or that an abortion was not absolutely necessary to save her life. In this way, the Act forces doctors to think about criminal prosecution at a time when we need to be concentrating on doing what is best for our patients, thus creating unnecessary risk to patients' health and lives.

Conclusion

20. In sum, because the Act will prevent me from caring for my patients according to accepted medical practice and my best medical judgment, I fear enforcement of the Act for my patients' sake as well as my own. The Act will cause grave harm because it does not allow for immediate abortions to protect a teenager's health and includes a "death exception" that is inadequate to protect my patients. The Act thus places me in fear of prosecution for fulfilling my duty as a physician, which is to proceed with my patient's safety as my paramount concern.

I declare under penalty of perjury that the foregoing is true and correct.

Dated: November 11, 2003

/s/ Wayne Goldner, M.D.
Wayne Goldner, M.D.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW HAMPSHIRE

PLANNED PARENTHOOD OF NORTHERN NEW ENGLAND, CONCORD FEMINIST HEALTH CENTER, FEMINIST HEALTH CENTER OF PORTSMOUTH, and **WAYNE GOLDNER, M.D.,** Plaintiffs,	)	CIVIL ACTION NO:
v.	)	
PETER HEED, Attorney General of New Hampshire, in his official capacity, Defendant.	)	

DECLARATION OF RACHEL ATKINS, P.A., M.P.H.

RACHEL ATKINS, P.A., M.P.H., declares subject to the penalties of perjury:

1. I am the Vice President for Medical Services of Planned Parenthood of Northern New England (PPNNE), a plaintiff in this case. I am a physician assistant and hold a masters degree in public health. I submit this declaration in support of plaintiffs' application for a preliminary injunction against the Parental Notification Prior to Abortion Act, which is scheduled to take effect December 31, 2003 (parental notice law). It is my opinion that if the parental notice law is allowed to take effect, some of PPNNE's minor patients will suffer irreparable injury.

2. PPNNE is a Vermont not-for-profit charitable organization registered to do business in New Hampshire.

PPNNE operates 27 health centers in New Hampshire, Maine and Vermont, with 8 of those centers in New Hampshire. PPNNE offers its patients a full range of reproductive health services, including family planning counseling and medical services, testing and treatment of sexually transmitted infections, HIV/AIDS testing and counseling, breast and cervical cancer screening, pregnancy testing and options counseling, abortions and prenatal care. In 2002, PPNNE served 19,028 patients in New Hampshire. PPNNE offers abortions in New Hampshire at its West Lebanon health center.

3. I have had extensive experience in abortion care, both as a provider of abortion services to adult women and teens, and as an administrator, managing the provision of abortion services. I began in 1978 as a health educator and abortion counselor and then trained as a physician assistant in women's health. As a physician assistant, I provided out-patient gynecological services, including first trimester abortions, for 15 years, from 1981 to 1995. During that time, I counseled hundreds of pregnant women, including numerous teenagers, regarding their pregnancies and their decisions to continue their pregnancies or to have an abortion. In addition, since 1987, I have supervised the provision of medical services, including abortion care. From 1987 to 2000, I was Executive Director of the Vermont Women's Health Center, a private non-profit medical practice that provided comprehensive obstetrical and gynecological health care, including abortions. In 2000, I took the position of Assistant Director of Medical Services at PPNNE and, in 2003 was promoted to Vice President for Medical Services. In my present position, I supervise the provision of all medical services including abortion services at PPNNE's medical centers in

Maine, Vermont and New Hampshire. I conduct these activities in cooperation with PPNNE's medical director, a physician.

4. The vast majority of minors who obtain abortions from PPNNE in New Hampshire involve a parent in their decision. The younger the minor is, the more likely she is to come to a health center with a parent. If a minor has not already talked to a parent, PPNNE staff explores with the minor her reasons for not involving a parent and encourages her to do so, unless parental involvement would be against her best interests. Often, after this counseling, minors agree to involve a parent. Of those who do not, nearly all involve a trusted adult, such as a relative or school nurse.

5. I have read the parental notice law and am aware that it does not have specific provisions to maintain the confidentiality of minors who attempt to obtain a judicial bypass. I believe that this lack of protection, especially in a rural state like New Hampshire, will have a deterrent effect on minors' willingness to use the bypass. Without guarantees that the bypass will be confidential, minors who fear notifying a parent, will be deterred from obtaining legal abortion services. Such minors may carry to term in circumstances that are against their best interests, delay the procedure, which can increase the risk of complications or, in some instances, resort to unsafe illegal or self-induced abortion. In addition, I fear that those minors who use the bypass and experience a breach of confidentiality in which their parents learn of their abortion, could experience harm in the form of being forced to carry a pregnancy to term against their will, being forced out of their homes, or being physically or emotionally abused or maltreated.

6. The small number of our patients unwilling to involve a parent in their abortion decisions often have serious reasons for not doing so. These reasons include fear of serious emotional or physical abuse, being thrown out of the home, and being cut off from parental support, including financial support and college tuition. These fears often are based on a parent's past specific threat of untoward consequences if the minor were ever to become pregnant. Minors often have good reason to believe a parent will carry out such threats. For example, parents may have maltreated them in the past in similar stressful situations or an older sibling may already have been thrown out of the home or beaten when a parent learned of a pregnancy. Among our patients have been young women from other countries and cultures who feared ostracism, even death, if an out-of-wedlock pregnancy were revealed to their families.

7. Sometimes the minor's parents are deeply ideologically opposed to abortion, and are even active in the local anti-abortion movement. Such minors fear an emotional rift if such parents find out about their decision or that the parent will try to block them from obtaining the abortion by confining them to the home or monitoring their activities. Recently, a parent active in the local anti-abortion movement repeatedly called our center, posing as her daughter, and attempted to cancel her daughter's appointment for an abortion. On the day of the daughter's appointment, she showed up at the health center, in an attempt to prevent her daughter from obtaining an abortion.

8. Often minors fear disturbing a family already in a stressful situation. A member of the minor's family, such as a grandparent, may recently have died; a minor's

parents may be dealing with a sibling who is in trouble because of criminal activity. One of our patients did not want to burden her mother, a widow who had recently been diagnosed with cancer. A minor may fear that news of her pregnancy and planned abortion will be more than a parent in these circumstances can handle.

9. I believe that minors' drive to maintain their confidentiality would deter many from using the judicial bypass if confidentiality were not assured. The possibility of a breach of confidentiality that could lead to a minor's parent finding out about her abortion is very real in communities where our patients reside. We draw our patients almost exclusively from the rural areas and small towns of New Hampshire. In these areas, the minor may have a relative or family acquaintance working at the courthouse. If the papers filed in a courthouse are not kept confidential, such persons could view them and report the abortion to the minor's parents. Similarly, if the courtrooms are not closed, there is a very real possibility that someone the minor knows could encounter her in the courtroom.

10. I also understand that the parental notice law does not make an exception for circumstances when delaying the abortion to comply with the notice requirements or to get a judicial bypass would seriously threaten a young woman's health. I understand that the only time a provider can go ahead with an immediate abortion is when the provider certifies that the abortion is necessary to prevent the minor's death and there is insufficient time to comply with the law's notice requirements. I fear that, without a proper health exception, minors who fear notifying their parents of their abortion decision will be deterred from seeking and obtaining abortions they need in urgent

medical circumstances. Such minors may well seek a judicial bypass, further delaying the procedure while their condition worsens. Others may simply delay seeking any help at all, leading to further deterioration of their condition with the possibility of permanent harm to their health. For these reasons, I believe the law must allow an immediate abortion where a minor's health would be endangered by delay.

Pursuant to 28 U.S.C. § 1746, I declare under penalty of perjury that the foregoing is true and correct.

Executed on: November 15, 2003

/s/ Rachel Atkins, P.A., M.P.H
Rachel Atkins, P.A., M.P.H

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW HAMPSHIRE

PLANNED PARENTHOOD OF NORTHERN NEW ENGLAND, CONCORD FEMINIST HEALTH CENTER, FEMINIST HEALTH CENTER OF PORTSMOUTH, and WAYNE GOLDNER, M.D.,	)	
Plaintiffs,	)	
v.	)	CIVIL ACTION NO:
PETER HEED, Attorney General of New Hampshire, in his official capacity,	)	
Defendant.	)	

DECLARATION OF JAMIE ANN SABINO, ESQ.

JAMIE ANN SABINO, ESQ., declares and states the following:

1. I am an attorney licensed to practice law in Massachusetts. I am the Chair of the Judicial Consent for Minors Lawyer Referral Panel, a panel of lawyers trained to represent minors seeking judicial waivers of Massachusetts' parental consent for abortion law (the Panel). In this role, I have been working with minors seeking judicial bypasses for over twenty years.

2. In addition to my work with the Panel. I have extensive experience as a family law practitioner and have represented clients in other types of civil and criminal cases. I have represented parents, including pregnant and parenting teens, and children in child protective services cases. I have worked as a court appointed investigator and

have been appointed *guardian ad litem* in abuse and neglect cases. I have litigated cases in all departments of the Massachusetts trial court system, including juvenile court, family and probate court, and the district court.

3. I have read New Hampshire's Parental Notification Prior to Abortion Act (the Act). I submit this declaration in support of plaintiffs' motion for injunctive relief because, based on my experience with parental involvement laws and judicial bypass systems in Massachusetts and in other states, I am convinced that the Act will irreparably harm young women seeking abortions in New Hampshire.

Background

4. Since 1981, Massachusetts law has required minors to obtain the consent of their parents before they may have an abortion. (Until March 1997, the law required that the minor obtain the consent of both parents. For the last six years, however, the law has been interpreted to require the consent of only one parent.) For minors who do not wish to involve their parents or who cannot obtain their parents' consent, Massachusetts law provides a judicial bypass procedure. This bypass procedure allows a minor to consent on her own to an abortion if she can prove to a court either that she is mature enough and capable of providing informed consent, or, if she is not sufficiently mature, that her best interests would be served by allowing her to obtain an abortion without involving her parents.

5. Before the law went into effect in 1981, Planned Parenthood League of Massachusetts and lawyers from the Women's Bar Association and the National Lawyers

Guild came together to devise a system for educating clinics and minors about the bypass process and for assisting young women with that process. The participants in those meetings developed the Judicial Consent for Minors Lawyer Referral Panel (the Panel) to recruit and train lawyers to represent young women seeking judicial bypasses. Panel lawyers, who today number over 100, have represented approximately 98 percent of the adolescents who have sought a judicial bypass.

6. I have been a member of the Panel since 1981 and co-chair or chair of the Panel since 1983. As a Panel member, I have represented approximately sixty young women in judicial bypass proceedings and been involved in almost all appeals that have occurred under this statute. As co-chair (and now chair) of the Panel, I also review the case summaries that attorneys who represent young women file with the Panel. I estimate I have reviewed over 5,500 such summaries. I also meet regularly with attorneys representing adolescents, with judges who hear bypass cases, and with clinic workers who assist pregnant adolescents. In addition, I conduct periodic trainings for attorneys on how to represent adolescents seeking a bypass. I am co-author of the training materials given to these attorneys and I periodically provide updates on the law and the implementation of the statute. By reason of these activities. I am very familiar with the workings of the Massachusetts judicial bypass system and the experiences of adolescents dealing with that system. I also consult with attorneys and reproductive health care providers in other states that have or are considering implementation of parental involvement laws, conduct trainings in other states for lawyers who will represent minors in bypass proceedings, and have reviewed literature

concerning the implementation of parental involvement laws in other states.

7. The Panel has worked hard to make the bypass process function as effectively as it can, and we have had success in some areas. In fact, since the parental consent law went into effect in 1981, about 16,000 minors have gone through the bypass system. During that twenty-two-year period, there have been only fifteen denials.

Parental Involvement in Minors' Abortion Decisions

8. In my experience, most minors involve their parents in their decision to have an abortion. According to one nationally representative study I am familiar with, the majority of unmarried minors having abortions (61%) did so with the knowledge of one or both of their parents. Stanley K. Henshaw & Kathryn Kost, *Parental Involvement in Minors' Abortion Decisions,* 24 Fam. Plan. Persp. 196, 199-200 & table 3 (1992).

9. The younger the minor, the more likely it is that she involves at least one parent in her abortion decision. Indeed, the study found that very few of the youngest minors obtained an abortion without the knowledge of at least one parent. For example, 90 percent of minors under the age of fifteen reported that one or both parents knew about their abortion. *Id.* at 200 & table 3.

10. Even for those minors unable to inform their parents of their abortion, the majority (52%, according to the study) include a trusted adult in their decision. *Id.* at 205 & table 8.

Reasons Minors Do Not Involve Their Parents In Their Decision

11. Although most adolescents do involve a parent in their decision to have an abortion, I know from my experience that there are many reasons why some adolescents cannot.

12. Some minors fear disclosure of their sexual activity and pregnancy will cause their parents to react violently. Adolescents who previously have been abused by their parents, including being struck, beaten, and subjected to severe verbal harassment, know that stress often triggers an abusive episode and thus realistically fear that news of their pregnancy will lead to an attack. Based on my experience, these fears are well-grounded; I have represented minors in abuse and neglect cases who have been subjected to such retribution after informing their parents of their pregnancy and intent to seek an abortion.

13. Likewise, minors whose pregnancy is the result of familial sexual abuse cannot safely share their abortion decision with their parents. Even notice to a non-abusing parent is often not a real option for a minor. For example, I remember the tragic story of one thirteen-year old girl who had been raped and impregnated by her mother's boyfriend. When the minor requested permission from her mother for an abortion, the mother called her a slut and threw her out of her home.

14. Other minors, who have not necessarily been abused before, have valid reasons to fear that discovery of their pregnancy will trigger first-time abuse. Some teens have been threatened by their parents with a variety of severe repercussions if they were to become pregnant, such as being beaten, being thrown out of the house, or

having all support cut off. Many of these teens have good reason to know that these are not just idle threats. For example, one teen I worked with had recently reunited with her family after running away from home. But when her family learned of her pregnancy and desire to have an abortion, she was thrown out of the house. She ended up having to live in a group home. I know of others who have seen sisters thrown out of the house or forced into an undesired teenage marriage after parents learned of their pregnancies.

15. In other cases, minors facing a stressful family situation elect to go to court to protect the fragile family unit from a burden they know will strain it beyond its limit. Often the family is in a state of chaos, dysfunction, or stress and the adolescent fears that news of her sexual activity, pregnancy, and desired abortion will be seriously harmful to the family. For example, Panel members have represented a teenager whose brother had committed suicide two weeks before; one whose mother had just been diagnosed with a brain tumor; another whose father had just lost his job; another whose father had just had a heart attack; and another whose father was brutally murdered two weeks before. These teens often feel that their parents are just barely coping with all the stress in their lives and that the additional impact of disclosure of their pregnancy would push their parents over the edge.

16. We see other teenagers who know that their parents would prevent them from obtaining the abortion or even going to court for a bypass if they learned of their pregnancy. These minors often have good reason to believe that their parents will act to prevent them from exercising their choice. For example, I recall one minor who sought a bypass because her parents had forced her to carry her

previous pregnancy to term against her will and she was determined not to let that happen again. I knew of another minor whose mother showed up at the bypass proceeding and told the judge that her daughter should be forced to carry the pregnancy to term in order to teach her responsibility. Although this minor was ultimately able to obtain a court order in her favor, because of her mother's involvement, an already difficult process became an adversarial and agonizing experience for her.

17. The reasons I have encountered as to why minors in Massachusetts do not involve their parents are equally true of minors in New Hampshire and throughout the United States. One study of minors who did not tell one or both parents about their abortion found that 14 percent did not tell their mother and eight percent did not tell their father for fear the parent would make the minor carry to term; 18 percent did not tell their mother and 13 percent their father for fear they would make the minor leave home; six percent reported not telling their mother and seven percent their father for fear they would be beaten; 25 percent did not tell their mother and 12 percent their father because the minor believed that the parent was under too much stress already; and at least 20 percent reported concern that telling a parent would cause problems between the minor's parents. *Parental Involvement in Minors' Abortion Decisions* at 202-03 & table 5.

18. At the other end of the spectrum, even some minors who have good relationships with their parents may be very strongly opposed to informing their parents of their pregnancy and decision to seek an abortion. These minors fear that their parents will be disappointed, that their parents will lose all faith and trust in them, and that their relationship with their parents will be irreparably

damaged. Some of these young women have never spoken to their parents about sex and feel unable to bring it up in the context of their pregnancy and desire to have an abortion. Whether rightly or wrongly, these young women so deeply believe they cannot inform their parents that they will take drastic steps – including taking actions that endanger their life and health – to keep their decision confidential. If the law does not allow them to access confidential abortions, these minors will ensure confidentiality through risky means. As one study reveals, 23 percent of minors said that, if parental notification were required, they would forego a safe and legal abortion. Nine percent said they would attempt a self-induced abortion or would obtain an illegal abortion. Another nine percent said they would carry their pregnancies to term. Approximately two percent said they would leave home rather than notify their parents about their pregnancy and planned abortion. The remaining three percent did not know what they would do. As the authors of the study concluded, these responses indicate "that a sizable proportion of teenagers believe that the notification of their parents would put them in a desperate situation and that they would be forced to resort to desperate measures to deal with it." Aida Torres et al., *Telling Parents: Clinic Policies and Adolescents' Use of Family Planning and Abortion Services,* 12 Fam. Plan. Persp. 284, 288 (1980).

19. What is clear, in all of these cases, is the depth of the minor's conviction that she cannot tell a parent about the abortion. Going to court to seek a waiver of a parental involvement law is a stressful and difficult step for a teen to take. Adolescents who resort to a judicial bypass procedure are so desperate to avoid their parents finding out that they are willing to contact a lawyer, reveal some of

the most private details of their lives to a stranger, arrange transportation to the courthouse, repeat their personal information, and wait while another stranger decides whether they are entitled to make a decision that will have profound consequences for their life.

Minors Who Do Not Involve Their Parents Need Guarantees of Confidentiality

20. For minors who cannot involve a parent in their pregnancy and planned abortion, confidentiality is critical, and is always a paramount concern of those seeking a bypass. Most of the minors I have represented have expressed repeated concerns about the confidentiality of the process, and I have had to assure them each time that the bypass will be entirely confidential. Many of these minors clearly indicated they would not undergo the bypass process if it was not confidential. Indeed, I know of misinformed teens who thought they were required to inform their parents about the abortion procedure and therefore delayed doing anything – even going to the doctor or getting any advice about their pregnancy and abortion. In addition to these concerns about direct notification, minors fear that other people will find out about their abortion and tell their parents.

21. Consistent with my experience, numerous medical groups and researchers have found that guarantees of confidentiality are critical to ensuring that adolescents seek the reproductive health care they need. For example, a recent study in the Journal of the American Medical Association reported that nearly half (47%) of the sexually active teenage girls surveyed at Planned Parenthood clinics throughout Wisconsin would stop using *all*

sexual health care services at the clinics if parents had to be notified that they were seeking prescription contraceptives. (Ninety-nine percent of these young women, however, said they would continue having sexual intercourse.) Diane M. Reddy et al., *Effect of Mandatory Parental Notification on Adolescent Girls' Use of Sexual Health Care Services*, 288 JAMA 710, 712-13 (2002). Likewise, the American Academy of Pediatrics has found that "even a perceived lack of confidentiality in health care regarding sexual issues deters [minors] from seeking services." American Academy of Pediatrics, *The Adolescent's Right to Confidential Care When Considering Abortion*, 97 Pediatrics 746, 749 (1996). Moreover, the American Medical Association reports that the desire to maintain confidentiality about abortion has been one of the leading reasons for illegal abortion deaths since 1973. Council on Ethical and Judicial Affairs, American Medical Association, *Mandatory Parental Consent to Abortion*, 269 JAMA 82, 83 (1993).

22. Minors' concern with confidentiality is well-founded. Research shows that if their confidentiality is breached, minors often suffer the harms of notification that they sought to avoid. Indeed, on [sic] study found that of those adolescents whose parents found out about their pregnancy without being voluntarily told by the daughter, a majority (58%) reported adverse consequences. Six percent reported quite serious consequences including physical abuse, being forced to leave home, or that their parents' health suffered. Ten percent said knowledge of the pregnancy caused problems between their parents. Such adverse consequences were two to four times as likely to occur when the parents discovered the pregnancy as when the daughter had voluntarily chosen to tell them. *Parental*

Involvement in Minors' Abortion Decisions, 24 Fam. Plan. Persp. at 204 & table 7.

23. Further, in my experience with minors in Massachusetts, I have found that some parents who inadvertently learn of their daughter's desire to seek an abortion will go so far as to interfere with, or obstruct, her access to a court. I know of cases in which young women failed to show up at scheduled court hearings and lost all touch with their attorneys as a direct result of parents discovering that the minors were seeking a judicial bypass. In one of these cases, I later learned, only because the minor's boyfriend contacted me, that the girl's mother was pressuring her into going through with the pregnancy.

24. Finally, I also know of several instances in which a minor seeking a judicial bypass had a relative or close family friend who worked in the courthouse. Understandably, these minors were extremely fearful that the relative or family friend would easily learn about the minor's effort to obtain a bypass and would inform the minor's parents. In these circumstances, knowing that the relative or family friend would not be allowed to enter the hearing or see the minor's court records, despite working in the courthouse, was of critical importance to these young women.

The Act's Bypass Lacks Specific Safeguards Necessary to Ensure Confidentiality

25. Based on my experiences, I have learned that if a bypass procedure is to provide a viable alternative to parental notice, it must have specific provisions explaining to court personnel the steps that must be taken in order to protect minors' confidentiality. I have reviewed the judicial

bypass procedure contained in the New Hampshire Act and it lacks these important provisions.

26. Although the Act says that "[p]roceedings . . . shall be confidential" and that an "expedited confidential appeal shall be available," it does not provide court personnel any specific instructions on what this means in the context of a judicial bypass proceeding. It does not, for example, instruct that hearings must be conducted in a closed courtroom, that records must be sealed, or that only essential court personnel can learn the minor's name. Without such instructions, court personnel cannot reasonably be expected to know what needs to be done to protect the confidentiality of minors seeking judicial waivers.

27. Based on my experience representing minors, parents, and others in a variety of cases, I know that judicial bypass proceedings present a set of confidentiality problems that simply do not arise in other cases. In complete contrast to the stringent confidentiality necessary for a bypass proceeding, in the vast majority of cases, it is understood that court rules require parties to use their names in pleadings, court hearings and arguments are open to the public, and court personnel are required to provide the public access to the docket and court records. Even in juvenile proceedings, which are not open to the general public, parents are summoned to attend the hearings and must be allowed access to the records. Judicial bypass cases, however, must be handled in an entirely different manner. Not only does a minor have a right of confidentiality vis-a-vis the public, but she also has the right vis-a-vis her parents. But nothing in New Hampshire's Act lets court personnel know this. Given that court personnel generally operate under the principle

that hearings and records are open to the public, or, at the very least, to the parents, it is unrealistic to expect court clerks to glean this difference from the Act's statement that "[p]roceedings . . . shall be confidential."

28. Indeed, that has been the experience in Massachusetts. When our parental consent law first came into effect, it contained language similar to New Hampshire's Act, simply providing that the bypass proceedings be confidential. Because the language of the Massachusetts statute alone provided no specific guidance, attorneys working with the court system developed forms, a procedure, and a standing order of the court to set forth the procedures for maintaining confidentiality in a bypass proceeding. Even with the standing order, there were enough confidentiality concerns that it was necessary to petition for guidelines from a justice of the Massachusetts Supreme Court. The standing order and guidelines specifically state, among other things, that the minors' names be redacted from the docket and the title of the case; that all court records and related materials be sealed and kept apart from other documents; that forms are used to ensure that the name of young woman appears in only one place – in a sealed envelope among the impounded material; and that hearings should be held in the judge's personal chambers and any unnecessary court personnel should be excluded.

29. In my experience, these guidelines have been essential to achieving a level of confidentiality in Massachusetts bypass cases that would otherwise have been lacking. Indeed, I have been informed by law clerks and a judge of instances in which parents, who somehow found out their daughter was seeking a bypass, called or showed up at the court demanding information. Both the clerks

and the judge told me that only because of the specific confidentiality guidelines did court personnel know that the records were to remain sealed and that the parents were not entitled to see the docket. This feedback confirms my belief that enforceable and specific instructions for bypass cases are an absolute minimum to an effective alternative to parental notification.

30. Because the New Hampshire Act lacks, as did the Massachusetts law, any of the most basic rules and guidelines for ensuring confidentiality, there is a significant risk that New Hampshire teens using the judicial bypass will face the harms of inadvertent disclosure of their pregnancy and/or decision to get an abortion. In my experience, this undermines the purpose of the bypass proceeding and in many cases leaves minors in essentially the same position as if they had been forced to notify their parents.

Conclusion

31. The Act presents a serious threat to the health, safety, and well-being of New Hampshire minors who for a whole host of reasons cannot involve their parents in their abortion decision. Because it lacks adequate protections to ensure that the process operates confidentially, it does not provide an effective opportunity for minors to obtain a waiver of the parental notice requirement. The Act should not be allowed to take effect, as it will irreparably harm young women seeking abortions in New Hampshire.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on November 7, 2003.

/s/ Jamie A. Sabino
JAMIE A. SABINO, ESQ.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW HAMPSHIRE

PLANNED PARENTHOOD OF NORTHERN NEW ENGLAND, CONCORD FEMINIST HEALTH CENTER, FEMINIST HEALTH CENTER OF PORTSMOUTH, and **WAYNE GOLDNER, M.D.,**	)	
Plaintiffs,	)	CIVIL ACTION NO:
v.	)	
PETER HEED, Attorney General of New Hampshire, in his official capacity,	)	
Defendant.	)	

MOTION FOR PRELIMINARY INJUNCTION WITH MEMORANDUM – ORAL ARGUMENT REQUESTED

NOW COME the Plaintiffs, through counsel, and petition this Court, pursuant to Fed. R. Civ. P. 65(b), for a preliminary injunction against enforcement of the Parental Notification Prior to Abortion Act, 2003 N.H. Laws ch.173, to be codified at RSA 132:24-:28 (the Act). A copy of the Act is attached to the Complaint as Exhibit A. The Act is scheduled to take effect December 31, 2003.

As grounds for this motion, plaintiffs allege as follows:

1. The Act prohibits a provider of abortion services from performing an abortion on an unemancipated minor without providing at least forty-eight hours advance notice

to a parent of the minor. Alternatively, the minor may obtain an order from a court waiving the notice requirement.

2. The Act contains no exception allowing the abortion to proceed without the delay required to notify a parent or obtain a judicial waiver when the delay would threaten the health of the minor patient. The Act contains only a limited exception to perform abortions necessary to prevent death.

3. The Act's provisions to waive notification provide that the court proceedings shall be confidential, but do not set forth specific provisions to protect confidentiality, including provisions for the sealing of records or the closing of hearings.

4. As shown in the accompanying memorandum of law filed in support of this motion, plaintiffs meet the standards for granting a preliminary injunction in that they are likely to succeed on the merits of their claims; they will be irreparably injured if the injunction is denied; the balance of hardships tips in their favor; and the injunction will serve the public interest. *Ross-Simons of Warwick v. Baccarat, Inc.*, 102 F.3d 12, 15 (1st Cir. 1996).

5. Plaintiffs have a strong likelihood of success on the merits because (a) the Act's failure to provide an exception from mandatory delay to protect a minor's health and only a limited exception to protect a minor's life, as well as its failure to adequately guarantee a confidential judicial procedure violates a minor's right to privacy as protected by the Fourteenth Amendment to the Untied States Constitution; (b) the Act is vague in violation of the due process clause of the Fourteenth Amendment by failing clearly to allow physicians to rely on their

good faith medical judgment in determining that an abortion is necessary to prevent death.

6. Plaintiffs and their minor patients will suffer irreparable injury if the Act is allowed to take effect because, among other things, the Act's failure to provide a health exception or an adequate life exception prevents abortion providers from performing emergency abortions necessary to protect minors' health and lives. In addition, the Act's failure to provide a confidential judicial bypass will deter minors from using that procedure and expose them to the risk of harm, including physical or emotional abuse from parental notification. Moreover, loss of constitutional rights is irreparable injury as a matter of law.

7. The balance of hardships favors the injunction because the defendant herein is not at risk of any harm.

8. Finally, the public interest is served by enjoining an unconstitutional statute and protecting the health and lives of young women until the matter can be decided on the merits.

9. Because this injunction will merely maintain the status quo and defendant will suffer no harm thereby, no bond should be required pursuant to Fed. R. Civ. P. 65(c).

MEMORANDUM STATEMENT (LR 7.1(a)(2))

10. In support of this motion, plaintiffs submit a memorandum of law, the Declarations of Wayne Goldner, M.D., Jamie Sabino, Esq. and Rachel Atkins, P.A., M.P.H., a proposed Order and their Complaint.

CONCURRENCE STATEMENT (LR 7.1(c))

11. Because of the nature of the relief sought and the fact that at this stage of the litigation opposing counsel has not yet entered an appearance, the undersigned has not obtained concurrence in the relief sought pursuant to Local Rule 7.1(c).

REQUEST FOR ORAL ARGUMENT (LR 7.1(d))

12. Oral argument is requested in order to assist the court in reaching a decision on this motion.

Wherefore, plaintiffs request that this Court set this motion for oral argument and grant this motion. A separate motion is filed today requesting expedited consideration of this motion.

Respectfully submitted,

Dated: November 17, 2003

/s/ Martin P. Honigberg
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Counsel for Plaintiffs, Concord
Feminist Health Center,
Feminist Heath Center of
Portsmouth, and
Wayne Goldner, M.D.

CERTIFICATION

I hereby certify that on the 17th of November, 2003, I caused a copy of the foregoing Motion for Preliminary Injunction, along with the Declarations of Wayne Goldner, M.D.; Jamie Sabino, Esq.; and Rachel Atkins, P.A., M.P.H.; and a proposed Order to be served by hand on Attorney General Peter Heed, Office of the Attorney General, 33 Capitol Street, Concord, New Hampshire 03301.

/s/ Martin P. Honigberg
Martin P. Honigberg

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW HAMPSHIRE

PLANNED PARENTHOOD OF NORTHERN NEW ENGLAND, CONCORD FEMINIST HEALTH CENTER, FEMINIST HEALTH CENTER OF PORTSMOUTH, AND WAYNE GOLDNER, M.D. Plaintiffs	*	No. C-03-491-JD
v.	*	
PETER HEED, ATTORNEY GENERAL OF NEW HAMPSHIRE, in his official capacity Defendant	*	

OBJECTION TO REQUEST FOR
DECLARATORY AND INJUNCTIVE RELIEF

The Defendant, by and through his counsel, the New Hampshire Office of the Attorney General, objects to the Plaintiff's request for declaratory and injunctive relief. In support of this motion, the Defendant submits the following:

1. 2003 N.H. Laws, Chapter 173, to be codified at RSA 132:24-28 is constitutional.

2. Plaintiffs are not likely to succeed on the merits, Plaintiffs will not suffer harm, the balance of hardships does not favor injunctive relief, and injunctive relief will not serve the public interest.

3. A contemporaneous memorandum of law is being submitted contemporaneously with this objection.

WHEREFORE, the Defendant respectfully requests that this Honorable Court:

A. Dismiss Plaintiff's complaint; and

B. Grant such other and further relief as may be just and proper.

Respectfully submitted,

PETER HEED
ATTORNEY GENERAL

By his attorneys,

/s/ Daniel J. Mullen
Daniel J. Mullen (#1830)
Associate Attorney General
Office of the Attorney General
33 Capitol Street
Concord, New Hampshire 03301
(603) 271-3658

December 3, 2003

Certificate of Service

I hereby certify that a copy of the foregoing has been mailed this day, first class, postage prepaid, to Martin P. Honigberg, Esquire, Sulloway & Hollis; Lawrence A. Vogelman, Esquire, Shuchman, Krause & Vogelman; Dara Klassel, Planned Parenthood Federation of America, Inc.; Jennifer Dalven and Corinne Schiff, American Civil Liberties Union Foundation.

/s/ Daniel J. Mullen
Daniel J. Mullen (#1830)